

2003

Ronald Kent Kunz and Roseann Jean Rockwell v. Stephen W. Rupp : Reply Brief

Utah Supreme Court

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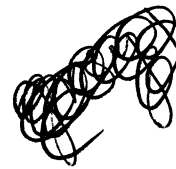
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IN THE SUPREME COURT OF THE STATE OF UTAH

In re: RONALD KENT KUNZ,

Debtor,

and

In re: ROSEANN JEAN ROCKWELL,

Debtor.

Bankruptcy Case
No. 02-40422GEC

Bankruptcy Case
No. 02-42013WTT

Appellate Court No. 20030502-SC

REPLY BRIEF OF TRUSTEE, STEPHEN W. RUPP

**CERTIFIED ISSUE FROM JOINT ORDER OF THE UNITED STATES
BANKRUPTCY COURT FOR THE DISTRICT OF UTAH, THE
HONORABLE GLEN E. CLARK AND WILLIAM T. THURMAN PRESIDING**

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PAT BARTHOLOMEW
CLERK OF THE COURT

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ARGUMENT

- 1. Although the basic facts of the case are not in dispute, the Trustee disputes the characterization of the facts by the debtor in his opening brief.**

In Ronald K. Kunz' Opening Brief, in the section entitled "Statement of Material Facts," the debtor asserts that "the only change in his IRA during the year prior to the Petition Date was that Mr. Kunz switched the account's custodian from Merrill Lynch to Wachovia." Opening Brief of Debtor Ronald Kent Kunz p. 4. Such a statement is only partly true. In addition to the change of custodian, the following occurred:

1) Ronald K. Kunz' individual retirement account at Merrill Lynch, account number 260-84S84 was closed. 2) The closing of the Merrill Lynch IRA resulted in the balance in the account going from more than \$20,000 to zero. 3) A new account at Wachovia Securities was created in the name of R. Kent Kunz, account number 4707-7518. 4) The value of securities and cash of the Wachovia Securities account on the August 2002 Statement, as of July 31, 2002 was \$0.00. See Wachovia Securities Account Statement attached to document #5 of the Index of Pleadings. 5) The closing value of the Wachovia Securities account at the end of the August, 2002 statement showed a value of cash and securities of \$20,784.19. The above events show that more than just a mere change of custodians occurred. One account with one custodian was closed and a new account, with a new account number and a new custodian was created.

The debtor also attempts to put words into the Trustee's mouth by stating that "Rupp filed an objection to Mr. Kunz' exemption of the IRA arguing that changing the

custodian through a rollover constitutes a new ‘contribution’ made within one-year prior to the Petition Date.” *Id.* at 4. The Trustee has never argued that this transaction was a mere change of custodians. Such a characterization of Rupp’s argument is misleading. A mere change of custodians would occur if, for example, the Custodian of an individual’s IRA was bought-out by another custodian. If there had been no change of account, only a change of custodian, the account holder’s account number would still be the same and the account holder would have never exercised any control over the funds. If the account were the same, there would have been no movement of the funds. Such a string of events would admittedly not amount to a contribution and transfer by the debtor. However, the foregoing is not the string of events which occurred in the case before the Court. Mr. Kunz withdrew funds from one account, moved those funds and deposited them in a new account with a different custodian; This was done by a rollover contribution. It still resulted in amounts being withdrawn from one account and moved to and deposited into another. Anytime the value in an account goes from zero to a higher amount an increase has occurred. In this case, the increase resulted because of the acts of the debtor, Ronald K. Kunz; The increase in the balance of the Wachovia Securities account occurred because funds were contributed to that account under the direction of Mr. Kunz.

In his Objection to Exemption the Trustee alleged that the Wachovia Securities account (the new IRA) had a value “due to the **contribution** of securities . . . and cash.” Index of Pleadings #5: Objection to Exemption and Notice of Hearing ¶

3(emphasis added). In response to the Trustee's assertion in paragraph 3 of the Objection and Notice of Hearing, that the value was a result of a "contribution" the debtor stated: "The Debtor **does not dispute** the facts alleged in paragraph 3 of the Trustee's Objection." Index of Pleadings # 7 or 8: Opposition to Trustee's Objection to Exemption ¶ 3(emphasis added). Thus, as the debtor admits, in his response to the Trustee's Objection to Exemption, the value in the Wachovia Securities account was the direct result of a contribution and should be included in the definition of amounts contributed in section 78-23-5(1)(b)(ii).

2. Mr. Kunz' conclusion, that any other interpretation, besides the one that favors him, would be an "absurd result," is absurd.

A common theme throughout Mr. Kunz' brief is that any interpretation, besides one that favors his own interests, would be absurd. This is despite the fact that Mr. Kunz admitted that the rollover was a contribution in his Opposition to Trustee's Objection to Exemption. Kunz now asserts that "[b]ecause the Utah Exemptions Act provides for specific exemptions by referring to the IRC, and because the IRC states that contributions to plans do not include rollovers as 'amounts contributed' the only clear explanation is that the phrase 'amounts contributed,' should not include rolled over amounts." Opening Brief of Debtor Ronald Kent Kunz, p. 6. The above argument is absurd, misleads the court and suggests judicial legislation rather than judicial interpretation.

To support his reasoning Mr. Kunz references 26 U.S.C. §415(c). But, what

Mr. Kunz fails to bring to the Court's attention is the exact language referenced in Section 415(c). The only language supporting Mr. Kunz's assertion is found in paragraph (c)(2)(C) of Section 415 where it states: "For the purposes of this paragraph, employee contributions under subparagraph (B) are determined without regard to any **rollover contributions . . .**" 26 U.S.C. 415(c)(2)(C)(emphasis added). Mr. Kunz conveniently leaves out the fact that Section 415 uses the term "rollover contribution." Given the complete language of Section 415, the more logical explanation, when the Utah legislature refers to the IRC in one paragraph or sub-paragraph of Utah Code Ann. 78-23-5 and not in a separate paragraph or sub-paragraph *of the same section* is because the legislature had a reason to reference the IRC in one paragraph and not in the next.

In addition to the above arguments, Mr. Kunz' interpretation ignores the plain language of the statute that creates an Individual Retirement Account, 26 U.S.C. § 408. Section 408(a)(1) plainly states: "Except in the case of a rollover contribution described in subsection (d)(3), in section 402(c), 403(a)(4) or 403(b)(8), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year on behalf of any individual in excess of the amount in effect for such taxable year under section 219(b)(1)(A)." The preceding paragraph plainly includes a rollover contribution as a contribution to an Individual Retirement Account. In fact, the rollover contribution in this case squarely fits within the meaning of subsection (d)(3), referred to in section 408(a)(1). Subsection (d)(3) states:

(3) Rollover contribution.--An amount is described in this paragraph as a rollover contribution if it meets the requirements of subparagraphs (A) and (B).

(A) In general.--Paragraph (1) does not apply to any amount paid or distributed out of an individual retirement account or individual

retirement annuity to the individual for whose benefit the account or annuity is maintained if--

(i) the entire amount received (including money and any other property) is paid into an individual retirement account or individual retirement annuity (other than an endowment contract) for the benefit of such individual not later than the 60th day after the day on which he receives the payment or distribution; or

(ii) the entire amount received (including money and any other property) is paid into an eligible retirement plan for the benefit of such individual not later than the 60th day after the date on which the payment or distribution is received, except that the maximum amount which may be paid into such plan may not exceed the portion of the amount received which is includible in gross income (determined without regard to this paragraph).

For purposes of clause (ii), the term 'eligible retirement plan' means an eligible retirement plan described in clause (iii), (iv), (v), or (vi) of section 402(c)(8)(B).

[(iii) Repealed. Pub.L. 107-16, Title VI, §§ 642(a), June 7, 2001, 115 Stat. 121]

(B) Limitation.--This paragraph does not apply to any amount described in subparagraph (A)(i) received by an individual from an individual retirement account or individual retirement annuity if at any time during the 1-year period ending on the day of such receipt such individual received any other amount described in that subparagraph from an individual retirement account or an individual retirement annuity which was not includible in his gross income because of the application of this paragraph.

26 U.S.C. 408(d)(3). Clearly Mr. Kunz' rollover contribution qualifies as a rollover contribution as defined in section 408(d)(3). First, his funds were withdrawn from Merrill Lynch, Account No. 260-84S84 and were subsequently moved to and deposited into Wachovia Securities Account No. 4707-7518 within 60 days from the date of distribution. Second, no amount in the account was attributable to any other source

other than the rollover contribution. Finally, Mr. Kunz did not take possession or withdraw any of the rolled over funds within one year from the distribution from the Merrill Lynch account. Thus, according to 26 U.S.C. 408 Mr. Kunz' rollover will not trigger a taxable event, but is still considered a rollover contribution pursuant to Section 408(a)(1) because amounts were contributed from one account to another account. To ignore this plain use of "rollover contribution" as it is used in the very statute defining an individual retirement account would be an absurd interpretation of amounts contributed, without further clarification or instructions from the legislature.

If this Court determines that the above transaction does amount to a mere change in custodian then one must ask, where is the line to be drawn? The United States Code Section creating an Individual Retirement Account, 26 U.S.C. 408 allows a debtor 60 days to rollover qualified funds and still qualify for non-recognition on his or her income tax returns. See 26 U.S.C.(d)(3)(A)(i). Is the debtor who withdraws IRA funds, deposits them in his own personal account and then redeposits them in a new IRA within 60 days of the withdrawal date subject to a different rule? The Trustee asserts that the latter transaction and the transactions before the Court should be treated similarly, each fits into the meaning of contribution as used in section 408(d)(3).

3. Although the Utah Exemption Act is to be construed liberally in favor of debtors, such a liberal interpretation should not include following *In re Allen*, 228 B.R. 132.

Mr. Kunz places some emphasis on *In re Allen*, 228 B.R. 132. In *Allen* “the parties disagree[d] as to whether Allen’s direct transfers of the sums then in his IRA and SEP from one custodian to another . . . constitute ‘contributions’ for the purpose” of the relevant Pennsylvania statute. *In re Allen*, 228 B.R. 132 (Bankr.W.D.Pa. 1998). In our case there is no such dispute, Mr. Kunz agreed in his Opposition to Trustee’s Objection to Exemption that the rollover was a contribution. See Index of Pleading 7 or 8: Opposition to Trustee’s Objection to Exemption ¶ 3.

Notwithstanding Mr. Kunz’ admission, *Allen* can be further differentiated. As background, *Allen* involved a dispute over whether a rollover from one IRA account to another IRA account constituted a contribution under an exemption statute similar to Utah Code Ann. §78-23-5(1)(b). However, the *Allen* court possessed insight regarding the legislative intent of the Pennsylvania legislature that does not exist in this case. The statute in question in *Allen* exempted from attachment or execution on a judgment “amounts contributed by the debtor to the retirement or annuity fund within one year before the debtor filed for bankruptcy.” *In re Allen*, 228 B.R. 132, 134 (citing 42 Pa.C.S.C. § 8124(b)(1)(ix) (Purdon’s 1998). However, the Pennsylvania legislature amended this language “to make clear that said exceptions ‘shall not include amounts directly rolled over from other funds which are exempt from attachment under this subparagraph.’” *Allen*, 228 B.R. at 134, fn. 2. The amendment went into effect after the debtor filed his bankruptcy, so the court was applying the old statute. Nonetheless, the court had the advantage of knowing the legislature’s intent regarding the application

of the statute, given the recent amendment.

In addition, the *Allen* court did not differentiate between the two separate accounts involved, the account from which funds were withdrawn and the account to which funds were deposited. Instead the case focused on the change of custodians, ignoring the language of 26 U.S.C. 408 as it pertains to rollover contributions being included in the definition of contribution. Given the differences in *Allen* and the case at bar, the unique facts surrounding the timing of the *Allen* decision and the fact that *Allen* comes from a non-controlling jurisdiction, *Allen* clearly is not controlling precedent. If anything should be taken from *Allen*, it should be that the Pennsylvania legislature determined the need to change the language of the statute to specifically exclude rollover contributions because without such a specific exclusion in the statute, “amounts contributed” would include rollover contributions.

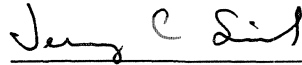
CONCLUSION

Because the debtor admits that the rollover from the Merrill Lynch account to the Wachovia Securities account was a contribution, the Internal Revenue Code section creating Individual Retirement Accounts includes rollovers as contributions and section 78-23-5(1)(b)(ii) does not specifically exclude rollover contributions from those amounts included in the meaning of “amounts contributed,” this Court should find that a rollover contribution at the direction of the account holder from one IRA to a new IRA is an amount contributed to the new IRA. Thus, the Trustee, Stephen W. Rupp respectfully asks this court to affirmatively answer the certified question - “amounts

contributed" includes rollover contributions.

Dated this 19th day of November, 2003.

McKAY, BURTON & THURMAN



Jeremy C. Sink
Attorneys for Trustee

CERTIFICATE OF SERVICE

I, Jeremy C. Sinal, hereby certify that on November 19, 2003, true and correct copies of the foregoing BRIEF OF THE TRUSTEE, STEPHEN W. RUPP were served via first-class mail, postage prepaid, to all Parties to the Proceeding, at the following addresses:

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